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CASE NO. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

ROBERT E. GIBSON, et al,

Petitioner,

vs.

GEORGE FIRESTONE,

Respondent.

ON WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

QUESTION I

WHETHER THE EXCLUSION FROM STATE COURT PROCEEDINGS OF PETITIONERS WHO AS TAXPAYING ELECTORS SPONSORED AND OBTAINED A STATE BALLOT POSITION FOR A TAX LIMITING CONSTITUTIONAL AMENDMENT WHILE PERMITTING AN OPPONENT OF SUCH AMENDMENT PARTY STATUS AS A TAXPAYING ELECTOR TO LITIGATE THE DESTRUCTION OF THE BALLOT STATUS VIOLATED THE EQUAL PROTECTION CLAUSE OF THE XIV AMENDMENT OF THE U. S. CONSTITUTION.

QUESTION II

WHETHER DESTRUCTION OF THE BALLOT STATUS OF THE CONSTITUTIONAL AMENDMENT SPONSORED BY PETITIONERS IN LITIGATION IN WHICH PARTY STATUS TO DEFEND THE AMENDMENT WAS LIMITED TO

THE FLORIDA SECRETARY OF STATE WHO OPPOSED THE AMENDMENT, AND WHO MADE NO DEFENSE, AND WHO FACILITATED DESTRUCTION OF THE BALLOT STATUS DEPRIVED PETITIONER OF DUE PROCESS OF LAW UNDER THE XIV AMENDMENT OF THE U. S. CONSTITUTION.

QUESTION III

DID THE COMBINATION OF THE CIRCUMSTANCES INVOLVING DENIAL OF PARTY STATUS TO ALL WISHING TO DEFEND THE BALLOT POSITION OF THE CONSTITUTIONAL AMENDMENT WITH THAT OF RETRO-ACTIVELY APPLYING MODIFICATION OF THAT INTERPRETATION OF WRITTEN LAW RELIED ON BY THE PETITIONERS IN MAKING LARGE EXPENDITURES TO ACHIEVE A BALLOT POSITION REACH THAT POINT OF FUNDAMENTAL UNFAIRNESS SUFFICIENT TO CAUSE A DENIAL OF THAT DUE PROCESS OF LAW PROVIDED BY THE XIV AMENDMENT OF THE U. S. CONSTITUTION.

PARTIES

In addition to the named parties, the following are petitioners: Ed Havill, Y. Y. Phillips, George Schulte, Floridians for Tax Relief (a political committee composed of 14,000 members) and Limit Government Committee.

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JURISDICTIONAL STATEMENT

The U. S. Court of Appeals entered its judgment on August 28, 1984 which became final without a Petition for Rehearing being filed. The Supreme Court's jurisdiction to review such opinion on certiorari is based upon 28 U.S.C. section 2101(c) and U. S. Supreme Court Rule 19, 28 U.S.C.A.

APPLICABLE CONSTITUTIONAL PROVISIONS

U.S.C.A. Constution Amendment 14, section 1.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Each of the petitioners contributed substantial money and labor which resulted in a proposed tax limiting Florida constitutional amendment receiving a certificate of ballot position the 21st of March, 1983, from the Secretary of State (Intervenors Complaint, paragraph 2 and 4). The Florida Supreme Court stated in 1983 that it would not apply modifications in its opinions to those who relied on the opinion before it was modified, and plaintiffs relied on such unmodified pronouncement and an unmodified 1978 and 1976 Florida Supreme Court holding as to what is a correct single subject form of a proposed constitutional amendment and relief upon approval of the Secretary of the form of the tax limiting amendment in obtaining the 600,000 signatures prior to receiving the certification of

ballot position (IIC 4, 5 and II Int.C. 3) (means Complaint Count II, Paragraph 4).

In July 1984, state complaintant Martin Fine (made a defendant below and dismissed by the Federal District Court at the commencement of the final hearing), brought a suit in the First District Court of Appeals of the State of Florida against Secretary, seeking to have the proposed amendment struck from the ballot (IC III). The Secretary of State, instead of defending the tax limiting proposal, assisted state complaintant's position by signing a consent to issuance of order to show cause submitted to him by attorney for state complaintant (TT 35-39, I C 3). The Secretary thereafter filed a response stating he was not a party having an interest in the defense of the tax limiting amendment and made no legal arguments in its support (I C 3). One state judge placed a

preliminary ruling note that the case lacked a party in interest for defense of the suit (TT 52-54).

The proponents urging each of the characteristics of standing urged by state complaintant, i.e., tax paying elector of the state of Florida, sought to intervene in defense of the tax limiting amendment, but were limited solely to amicus status (I C 4, TT 108-110). The District Court sustained the candidacy of the tax limiting amendment but certified without objection from any party (amicus could not object) the matter to the Florida Supreme Court (I C 5). While the issue of the validity of the amendment was before the courts, the Attorney General (the sole attorney representing the sole party on the defense side of the case) appeared before the Florida Bar an agent an arm of the Supreme Court and sought and obtained a

resolution of such body opposing the amendment (TT 47, 77). The Attorney General during litigation opposed the amendment publicly (TT 95). He refused to appoint a special prosecutor willing to support the tax limiting amendment (TT 94).

The Florida Supreme Court invalidated the proposed amendment, finding it necessary to modify the two cases of Floridians Against Casino Takeover v. Let's Help Florida, 323 So.2d. 337 (Fla. 1978) and Weber v. Smathers, 338 So.2d. 819 (Fla. 1976) and to apply the modifications retrospectively to the supporters of the amendment even though the supporters had relied on such cases to construct the amendment and had acted on such reliance expending substantial labor and funds (II C 4). Proponents having no party status in the state litigation (though appearing in both state courts as amicus)

filed in the U. S. District Court for the Northern District of Florida a civil rights suit against the Florida Secretary of State, George Firestone, and Martin Fine, the complaintant in the state court system (IC 1). State complaintant was dismissed at his request pursuant to the court finding that no type of injunctive order was appropriate as to him (TT 4-6). The court held a final hearing, heard the testimony and admitted all 16 of plaintiffs' documents into evidence and the deposition of the Secretary and Mr. Gibson (TT 107, 117). The court, at the end of the final hearing, dismissed the complaint as not stating a cause of action (TT 159, 160). The court stated that it considered both the evidence and law in dismissing the complaint (TT 158).

An appeal to the U.S. Court of Appeals of the Eleventh Circuit as authorized by 28

U.S.C. section 1291 resulted in an affirmance with written opinion set forth in the appendix. Review is now sought by Petition for Writ of Certiorari.

QUESTION I

WHETHER THE EXCLUSION FROM STATE COURT PROCEEDINGS OF PETITIONERS WHO AS TAXPAYING ELECTORS SPONSORED AND OBTAINED A STATE BALLOT POSITION FOR A TAX LIMITING CONSTITUTIONAL AMENDMENT WHILE PERMITTING AN OPPONENT OF SUCH AMENDMENT PARTY STATUS AS A TAXPAYING ELECTOR TO LITIGATE THE DESTRUCTION OF THE BALLOT STATUS VIOLATED THE EQUAL PROTECTION CLAUSE OF THE XIV AMENDMENT OF THE U. S. CONSTITUTION.

Denial of petitioners' demands to be made parties to the state proceedings on the basis of the same status as found adequate to provide party status to the opponent in the tax limiting amendment was a denial of equal protection. Thus petitioners as taxpaying electors were denied the right to defend the

ballot position for their political ideology of tax limitation but Martin Fine, an opponent of such ideology was permitted entry into the courts to attack the ballot status based upon the urging of the identical taxpaying elector characteristics urged by petitioners. Thus the basis for exclusion was that petitioners favored tax limitation. The basis for entry was that the proposed party disfavored tax limitation. Under Art. V, Sect. 3(b) of the Florida Constutition the order denying party status in an original action brought in the appellate court was non-appealable. The Florida courts excluded petitioners and limited party status to the announced opponent of the amendment, Martin Fine, and the tacit opponent of the amendment, George Firestone, Secretary of State of Florida. The deprivation of petitioner's right to be

heard in defense of the amendment in a manner equal to that right to be heard extended to those opposing the amendment denied petitioners equal protection of the law. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

QUESTION II

WHETHER DESTRUCTION OF THE BALLOT STATUS OF THE CONSTITUTIONAL AMENDMENT SPONSORED BY PETITIONERS IN LITIGATION IN WHICH PARTY STATUS TO DEFEND THE AMENDMENT WAS LIMITED TO THE FLORIDA SECRETARY OF STATE WHO OPPOSED THE AMENDMENT, AND WHO MADE NO DEFENSE, AND WHO FACILITATED DESTRUCTION OF THE BALLOT STATUS DEPRIVED PETITIONER OF DUE PROCESS OF LAW UNDER THE XIV AMENDMENT OF THE U. S. CONSTITUTION.

The petitioners were deprived of their substantial rights in the ballot status obtained for their tax limiting ideology by proceedings in which they were excluded from party status and limited to the nominal role of an amici curiae. The petitioners in being limited to this role were prevented from

taking an appeal or seeking review in the U. S. Supreme Court. Winter Haven v. Gillespie, 84 F.2d. 285 (Fla. 1936). Amici can not challenge the validity of the original action, 236 A.2d. 327 (Pa. 1970). He cannot raise new issues. Keating v. State, 157 So.2d. 567 (Fla. App.)

Because of these limits on his participation the amici are unbound by the decision Arkla Exploration Co. v. Watt, 548 F. Supp. 466; Aero-Jet General v. Askew, 511 F.2d. 710 (5th Cir. 1978); Holt v. Virginia, 381 U.S. 131 (1965) establishes that procedural due process requires that a person sought to be affected by the proceedings have the right to raise issues, set up defenses, and file motions. The traditional denial of these rights to petitioners combined with the circumstances of denying them the power to seek U.S. Supreme Court review denied them

procedural due process which is traditionally remedied by imposing amicus status only on those who will be unaffected by the final decision.

Petitioners, being limited by the Florida courts to amicus status were effectively denied those powers needed to properly litigate their protected interest in the candidacy of their creed. The candidacy being that of a concept rather than an individual, the inanimate candidate could only be defended by others and as shown in the Statement of Facts there was no defense by others once petitioners are the only parties in interest seeking to defend the suit were excluded by being limited to the nominal role of amicus curiae. Petitioners lost their substantive right in the ballot position of their creed. The right was obtained by the action of petitioners in

expending large sums of money and effort to obtain 600,000 signatures supporting an amendment which polls revealed had overwhelming popular support. The right was lost in a state judicial proceeding in which only those in opposition to the amendment were permitted to appear as a party. Straw man litigation was used to wrongfully deprive non-parties of a substantive right belonging solely to them. See Aerojet-General Corp. v. Askew, 511 F.2d. 710 (5th Cir. 1975).

QUESTION III

DID THE COMBINATION OF THE CIRCUMSTANCES INVOLVING DENIAL OF PARTY STATUS TO ALL WISHING TO DEFEND THE BALLOT POSITION OF THE CONSTITUTIONAL AMENDMENT WITH THAT OF RETRO ACTIVELY APPLYING MODIFICATION OF THAT INTERPRETATION OF WRITTEN LAW RELIED ON BY THE PETITIONERS IN MAKING LARGE EXPENDITURES TO ACHIEVE A BALLOT POSITION REACH THAT POINT OF FUNDAMENTAL UNFAIRNESS SUFFICIENT TO CAUSE A DENIAL OF THAT DUE PROCESS OF LAW PROVIDED BY THE XIV AMENDMENT OF THE U. S. CONSTITUTION.

The case of Griffin v. Burns, 570 F.2d. 1065 (1st Cir. 1978) holds that state election practices under some circumstances operated so unfairly as to constitute a denial of due process. Such case found a

retroactive application of a judicial ruling to invalidate absentee votes previously cast to be so unfair as to constitute a denial of due process under circumstances where the affected voters were denied intervention at the state level. The court noted:

> Prompt objection to quashing the ballots was made in federal court by the voters; and the federal court acted only after they were refused permission to intervene in the state court proceeding.... And the federal court was the only practical forum for redress; there appears to have been no standard state procedure for handling a claim such as this, and the state court did not confront the questions that retroactive application of its ruling would create.

570 F.2d. at 1970 (emphasis supplied).

Duncan v. Poythress 657 F.2d. 691 (5th Cir. 1981) adopts the principal of Griffin supra and holds the states' unfair by-passing of the election process by a conspiracy to create an office vacancy in a manner which will require an appointment of a replacement was so unfair as to deny due process of law

wrongfully. State action through the judiciary are subject to federal correction in litigation between private parties. See Shelley v. Kraemer, 334 U.S. 1 (1947). The Duncan opinion makes the following concrete analysis of the due process weighing of fairness.

> This case brings before us a question heretofore unanswered in the Fifth Circuit whether the due process clause of the fourteenth amendment offers protection against those rare, but serious, violations of state election laws that undermind the basic fairness and integrity of the democratic system. Although we recently decided that the fourteenth amendment provides no guarantee against innocent irregularities in the administration of state elections, we were not required to determine when state

election practices "may operate so unfairly as to constitute a denial of ... due process...." Gamza v. Aguirre, 619 F.2d. 449, 454 n. 6 (5th Cir., 1980) (citing Griffin v. Burns, 570 F.2d. 1065, 1078-79 (1st Ciir. 1978) and Briscoe v.Kusper, 435 F.2d. 1046 (7th Cir. 1970)). The approach which we adopted in Gamza, however, and the guidance offered by cases such as Griffin and Briscoe, point the way to our holding today that the due process clause of the fourteenth amendment prohibits action by state officials which seriously undermine the fundamental fairness of the electoral process.

657 F.2d. at 699-700.

Despite this broad authority enjoyed by

the states over the scope and conduct of elections, the federal courts have not hesitated to interfere when state actions have jeopardized the integrity of the electoral process. Of ccurse, most cases of federal court intervention have been brough under the fourteenth amendment's equal protection clause and concerned the purposeful denial, or dilution, of the voting rights of a segment of the electorate. In Bell v. Southwell, 376 F.2d. 659 (5th Cir. 1967), for instance, this court voided a state election and ordered a special election--with full recognition of the " d rastic, if not staggering" nature of this relief--because racially discriminatory practices in the administration of a local election rose in constitutional significance far above the usual claim of election inrregularities.

Less frequent than such equal protection cases are those instances in which federal courts have intervened instate election matters because of a violation of the fourteenth amendment guarantee of due process. On this ground, the Seventh Circuit has held that section 1983 provides a federal remedy if state officials place a sham candidate on a ballot in order to appoint his successor following his expected victory and pre-arranged resignation. Smith v. Cherry, 489 F.2d. 1098 (7th Cir. 1983), cert. denied, 417 U.S. 910, 94, S. Ct. 2607, 41 L.Ed. 2d 214 (1974), 651 F.2d. 701-702.

The recent case of Anderson v. Celebrezze, 75 L.Ed.2d. 547 (1983) followed a comparable doctrine in finding to be an

unfair burden a state requirement for an independent presidential candidate to file an early declaration of candidacy. The unfair circumstances applicable to petitioners discussed in the prior portion of the brief combine with the following additional factor. The Florida Supreme Court in Humphrey v. State, 145 So. 858 (Fla. 1933) and Florida Forst and Park Services v. Strickland, 18 So.2d. 251 (Fla. 1944) announced that its modification of interpretations of written law would not be retrospectively applied to those who had relied on the former interpretations before the modifications were announced. The proponent and others as verified in the statement of the case expended substantial funds and labor in achieving ballot status for their creed in a form provided in the construction by the Florida Supreme Court

placed on the initiative provision of the Florida Constitution (Art. XI, Sec. 5) by that court's opinion in Weber v. Smathers, 338 So.2d. 819 (Fla. 1971), and Floridians Against Casino Take Over v. Lets Help Florida, 363 So.2d. 337 (1978). The Florida Supreme Court acknowledged that proponents had complied with its rulings in Weber and Floridians, supra, by finding it necessary to modify such opinions in order to divest proponents of that ballot status of their creed already acquired through proponent's exensive activities.

This retroactive application of a ruling was found to be a denial of due process because of gross unfairness in the Griffin case, supra. Petitioners, like the parties in Griffin, supra, also were excluded from the state proceedings. The combination of circumstances far exceed the unfair burden

remedied by the 5 to 4 ruling of this curt in Celebrezze, supra.

CONCLUSION

Since all material testimony and evidence is complete and undisputed, this court can act as the trial court removing the necessity of remanding the case. Proponents request this Court to direct the Secretary to take all action necessary to give Proposition 1 a ballot status in the next general election of Florida, or alternatively, to direct him to hold an early special election.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the Petition for Writ of Certiorari was served by U. S. Mail, Postage Prepaid, this 19th day of December, 1984, on Asst. Atty. General Mitchell Franks, Attorney for the Secretary of State of Florida, The Capitol Building, Tallahassee, Florida.

James G. Mahorner